No. 21-20279

In the United States Court of Appeals for the Fifth Circuit

FREEDOM FROM RELIGION FOUNDATION, INC.; JOHN ROE,
Plaintiffs-Appellees,

v.

WAYNE MACK, INDIVIDUAL CAPACITY,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division

BRIEF FOR THE STATES OF TEXAS, LOUISIANA, AND MISSISSIPPI AS AMICI CURIAE

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

JUDD E. STONE II
Solicitor General

NATALIE D. THOMPSON
Assistant Solicitor General
Natalie.Thompson@oag.texas.gov

Counsel for Amici Curiae

Certificate of Interested Persons

No. 21-20279

Freedom From Religion Foundation, Inc.; John Roe,
Plaintiffs-Appellees,

v.

Wayne Mack, Individual Capacity,
Defendant-Appellant.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, amici curiae, as governmental parties, need not furnish a certificate of interested persons.

/s/ Natalie D. Thompson
Natalie D. Thompson
Counsel of Record for
Amici Curiae

TABLE OF CONTENTS

Table of Authorities

Page(s)

Cases:

Constitutional Provisions, Statutes, and Rules:

Interests of Amici Curiae

Amici curiae are the States of Texas, Louisiana, and Mississippi. The States share two major interests in the case before this Court.

First, sovereign immunity. Amici States have an interest in maintaining the limitations on federal courts' Article III jurisdiction to entertain suits against sovereign States. The district court's adjudication of this case undermines Amici States' interests in their own sovereign immunity. Amici seek to ensure that the Court does not countenance this error.

Second, the Establishment Clause. The district court would block a duly elected justice of the peace from permitting an invocation by the volunteer chaplains who participate in the "brief opening ceremony" that opens his court. The logic of the district court's decision could be applied to prohibit any role for religious invocations in any government proceeding. That is at odds not only with precedent, but also with the views of the many citizens of Amici States who envision a positive role for religion in public life. The States thus urge the Court to reverse the erroneous ruling of the district court.

Argument

I. Sovereign Immunity: A Suit Against a State Official in his "Official Capacity" *is* a Suit Against the State.

"[T]he Constitution does not provide for federal jurisdiction over suits against nonconsenting States." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000); *see also Okpalobi v. Foster*, 244 F.3d 405, 411 (5th Cir. 2001) (en banc) (plurality op.). And a suit against a state official in his official capacity *is* a suit against the State for

all purposes other than sovereign immunity. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991); *Carten v. Kent State Univ.*, 282 F.3d 391, 396–97 (6th Cir. 2002). While the district court correctly dismissed Plaintiffs' claims against the State, it later "purported to enter a default judgment against Judge Mack in his official judicial capacity on behalf of the State of Texas." *Freedom from Religion Found. v. Mack*, 4 F.4th 306, 313 (5th Cir. 2021). This move was "equal parts bizarre and wrong." *Id.* Plaintiffs cannot sue Judge Mack as a state official without suing the State of Texas.

It is true that the fiction of *Ex parte Young*, 209 U.S. 123 (1908), provides a way around sovereign immunity. *See Edelman v. Jordan*, 415 U.S. 651, 664–68 (1974) (providing an overview of the doctrine). Under *Ex parte Young*, sovereign immunity does not bar a suit that "seeks prospective, injunctive relief from a state actor, in [his] official capacity, based on an alleged ongoing violation of [federal law]." *K.P. v. LeBlanc*, 729 F.3d 427, 439 (5th Cir. 2013); *see also Mi Familia Vota v. Abbott*, 977 F.3d 461, 467 (5th Cir. 2020). Of course, "[t]here is a well-recognized irony" to that doctrine: "unconstitutional conduct by a state officer may be 'state action' for purposes of the Fourteenth Amendment yet not attributable to the State for purposes of the Eleventh [Amendment]." *Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 685 (1982); *see also Carten*, 282 F.3d at 396–97.

Plaintiffs' claims against the State of Texas were dismissed by the district court, and as a panel of this Court explained in granting Judge Mack a stay of the district court's injunction, the purported default judgment against Judge Mack "in his official capacity as a state official" is inoperative. *Freedom from Religion Found.*, 4 F.4th at 310. As this Court explained, "[w]ere it otherwise, the district court could

enter an official-capacity judgment that's completely unchallengeable—either by Judge Mack's individual-capacity lawyers or by the State, which has been dismissed and which is unconnected to Judge Mack in any event." *Id.* at 313. Consequently, Texas is not a party to this appeal. As amici curiae, the States urge the Court to reaffirm that a suit against a State and an official-capacity suit against a state official cannot be disaggregated in the way suggested by the district court's "bizarre" series of orders. *Id.*

Plaintiffs contended below that *Ex parte Young* allows them to overcome Texas's sovereign immunity, *see* ROA.719, but that is wrong. *Ex parte Young* is inapplicable because Judge Mack is not a state actor when he engages in the conduct Plaintiffs complain of. Judge Mack is a county official—a justice of the peace for one of Montgomery County's precincts. As this Court explained, "Judge Mack is, for all relevant purposes, a county official only" and not subject to an *Ex parte Young* claim. *Freedom from Religion Found.*, 4 F.4th at 312 n.4.

To be sure, this Court has held that a "municipal judge acting in his or her judicial capacity to enforce state law does not act as a municipal official." *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992). But Plaintiffs have not alleged any state law that guides, influences, or otherwise informs invocations offered by the volunteer chaplains. ROA.20–21; ROA.25–28. Judge Mack is not "enforc[ing] state law," *Johnson*, 958 F.2d at 94, when he begins the court session with an opening ceremony recognizing volunteer chaplains. Administrative procedures like the opening ceremony do not cause him to become an agent of the State.

Plaintiffs argued Texas can be held liable for Judge Mack's actions under *Ex parte Young* because his "judicial power is derived directly from the Texas Constitution." ROA.518. But the Texas Constitution provides for numerous county officers who are not subject to control by the State. *See, e.g.*, Tex. Const. art. V, § 18(b) ("Each county shall . . . be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner . . ."); *id.* art VIII, § 14(a) ("The qualified voters of each county shall elect an assessor-collector of taxes[.]"). Political subdivisions and local officials do not share Texas's sovereign immunity. *See Cutrer v. Tarrant County Local Workforce Dev. Bd.*, 943 F.3d 265, 269 (5th Cir. 2019). Under Plaintiffs' logic, any local official whose office is created by the State's constitution would become a state official for whom the State is held responsible. *See Carten*, 282 F.3d at 396–97 (*Ex parte Young* says not "that the official [i]s stripped of his official capacity for all purposes, but only for purposes of the Eleventh Amendment."). The Court should not endorse Plaintiffs' untenable theory. *See Freedom from Religion Found.*, 4 F.4th at 312 & n.4.

II. Establishment Clause: Judge Mack's Court Openings Are Well Within the Nation's History and Tradition.

Judge Mack opens his courtroom each day with a ceremony that includes, *inter alia*, the Pledge of Allegiance and an invocation by a volunteer chaplain representing one of a wide variety of religious traditions. *See* Blue Br. at 5–8. The district court held that this violates the Establishment Clause. This holding is puzzling, given that the Supreme Court has held opening prayers before meetings of government bodies do *not* violate the Establishment Clause. *See Town of Greece v. Galloway*, 572 U.S. 565,

570 (2014), *Marsh v. Chambers*, 463 U.S. 783, 790–91 (1983); *see also Am. Humanist Ass'n v. McCarty*, 851 F.3d 521, 525–27 (5th Cir. 2017) (prayer at a school board meeting). Acknowledging these precedents, the district court offered a four-point rationale to distinguish Judge Mack's practices. Upon inspection, each point proves unconvincing.

First, the district court says that *Marsh*, *Town of Greece*, and *American Humanist Association* all involved prayers before legislative bodies, declaring that "[t]hus, those cases' outcomes do not inherently control where, as here, the challenged ceremony occurs in an adjudicative setting." *Freedom from Religion Found. v. Mack*, 2021 WL 2044326, at *5 (S.D. Tex. May 20, 2021). But, as this Court noted in staying the district court's injunction, it is "unclear why that matters." *Freedom from Religion Found.*, 4 F.4th at 313. The district court did not identify any meaningful distinction between Judge Mack's court and a legislative body. Such a lack of analysis can hardly justify reaching a different result, much less explain the district court's decision to discard these decisions as irrelevant. And in any event, *American Humanist Association* determined that prayer at a school board meeting was in keeping with the First Amendment, 851 F.3d at 526–27, and Texas school boards have adjudicative functions, *see, e.g.*, Tex. Educ. Code §§ 21.156, 21.255 *et seq.*

Second, the district court concluded that "public prayer to begin court proceedings is not historical." 2021 WL 2044326, at *5. But Judge Mack has identified various historical examples of prayers at government proceedings, including in court. *See* Blue Br. at 26–28. The district court's analysis is best characterized as a series of quibbles about how the identified historical practices

differ from Judge Mack's practices. The Court declares itself "not persuaded" by the historical evidence cited by Judge Mack, concluding that the evidence itself showed just how "unusual" such prayers were. 2021 WL 2044326, at *6.

A fair examination of the survey of historical practice offered by Judge Mack cannot support such a conclusion. *See* Blue Br. at 26–28. Rather, as this Court has explained, "[o]ne cannot simply ignore the historical record and then pretend it's silent." *Freedom from Religion Found.*, 4 F.4th at 314.

Third, the district court concluded that Judge Mack's practice "impermissibly coerces the attendees into participating in religious ritual" because "a litigant's, or her attorney's, attendance is not voluntary in any real sense." 2021 WL 2044326, at *6. It reached this conclusion despite acknowledging that the court posts signs and makes announcements inviting those who do not wish to participate to wait outside, *id.* at *2, *6, asserting that "imposing such a 'choice' onto a litigant or her counsel is inherently coercive." *Id.* at *6. There is significant reason to question that characterization. *See Freedom from Religion Found.*, 4 F.4th at 308 ("Participation in the opening ceremonies is completely optional."). But even if it were accurate, the district court's reliance on coercion would be improper. The district court's invocation of "coercion" stands in defiance of the Supreme Court's ruling in *Town of Greece*, which rejected "subtle coercive pressures" as a basis for holding prayers before government bodies to be unconstitutional. *See* 572 U.S. at 577–78; *id.* at 586–91 (Kennedy, J.); *id.* at 610 (Thomas, J., concurring). What the district court's conclusion really represents is an attempt to extend *Lee v. Weisman*, 505 U.S. 577 (1992), beyond the narrow context of school prayer. That move was rejected by the

Supreme Court in *Town of Greece*, 572 U.S. at 590, and by this Court in *American Humanist Association*, 851 F.3d at 526–28. This Court should reaffirm that *Lee's* framework is cabined to the public-school context to prevent it from muddying the waters of future Establishment Clause cases.

Fourth, the district court relied on the *Lemon* test. 2021 WL 2044326, at *7 (citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). That too stands in defiance of *Town of Greece*. As this Court has explained, "the Supreme 'Court no longer applies the old test articulated in Lemon.'" *Freedom from Religion Found.*, 4 F.4th at 315 (quoting *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2092 (2019) (Kavanaugh, J., concurring)). As with the district court's attempts to borrow *Lee's* coercion test, this Court should not allow the *Lemon* test—so recently laid to rest by the Supreme Court—to live on in this Court's Establishment Clause jurisprudence.

Conclusion

The Court should reverse the judgment of the district court.

Respectfully submitted.

Jeff Landry
Attorney General of Louisiana

Lynn Fitch
Attorney General of Mississippi

Ken Paxton
Attorney General of Texas

Brent Webster
First Assistant Attorney General

Judd E. Stone II
Solicitor General

/s/ Natalie D. Thompson
Natalie D. Thompson
Assistant Solicitor General
Natalie.Thompson@oag.texas.gov

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Counsel for Amici Curiae

Certificate of Service

On September 29, 2021, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Natalie D. Thompson
Natalie D. Thompson

Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 1,903 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Natalie D. Thompson
Natalie D. Thompson